



Comptroller General
of the United States

Washington, D.C. 20548

140/86

Decision

Matter of: Bergen Expo Systems, Inc.; Techniarts
Engineering

File: B-236970; B-236970.2

Date: December 11, 1989

DIGEST

Proposals delivered late by Federal Express properly were rejected where, although the government may have contributed to the late delivery by restricting access to the proposal depository, the paramount cause of the late delivery was, initially, the failure of the Federal Express courier to wait for a reasonable amount of time to make delivery to agency personnel, and, subsequently, the failure of the same courier to return prior to the time designated for receipt of proposals, specified on one of the proposal envelopes, to make another attempt at delivery.

DECISION

Bergen Expo Systems, Inc., and Techniarts Engineering protest the rejection of their proposals as late under request for proposals (RFP) No. DAHC90-89-R-0008, issued by the Department of the Army Intelligence and Security Command, Fort Belvoir, Virginia, for an audiovisual presentation system. The protesters contend that improper government action prevented the timely delivery of their proposals.

We deny the protests.

The RFP required the submission of proposals by 12:00 noon, Eastern Standard Time, on August 24, 1989, extended by amendment to September 7. The solicitation advised offerors that hand-carried proposals would be received in the depository in Building No. 2444, Fort Belvoir, until the designated time. The RFP incorporated by reference Federal Acquisition Regulation § 52.215-10, which applies to the late submission of proposals. The RFP advised offerors that the envelope used in submitting proposals must be plainly marked with the solicitation number and the date and time set forth for receipt of proposals. Bergen's proposal was delivered in an envelope that was properly marked, as

required by the RFP; Techniart's proposal envelope was not marked.

Two proposals were timely submitted. Bergen's and Techniarts' proposals were sent by Federal Express, a commercial delivery service. The Federal Express courier attempted delivery of both protesters' proposals at 8:33 a.m., on September 7, but a security guard denied the courier entry into Building No. 2444, where the depository was located. Rather than waiting for mailroom personnel who were called by the security guard to accept delivery of the proposals, the courier left after waiting 10 to 15 minutes. The courier subsequently returned and delivered both proposals at 12:26 p.m., 26 minutes late. The protesters' proposals therefore were rejected as late.

Bergen contends that the contracting agency unfairly refused to accept its proposal because the agency has admitted that it did not allow the Federal Express courier to deliver Bergen's proposal at 8:33 a.m., 3-1/2 hours prior to the 12:00 noon deadline. Additionally, Bergen contends that the government was dilatory throughout the procurement process and issued amendment No. 2 to the RFP, which was confusing and required clarification, just 6 days prior to the September 7 closing date, thereby forcing Bergen to use a commercial carrier to deliver its proposal.

Techniarts contends that the government in effect improperly modified the solicitation's terms--which provided that hand-carried proposals could be delivered to and deposited in the depository located in Building No. 2444--when it denied the Federal Express courier access to the building in which the depository was located. Techniarts argues that the Army knew that the policy in effect in Building No. 2444 was wrong because the agency has since changed its procedure and now allows Federal Express to make deliveries within the building. The protester also argues that the Federal Express courier cannot be expected to wait 10 to 15 minutes to make each delivery since on-time delivery is of importance to Federal Express. Because the depository was not made accessible to their agent, Federal Express, Techniarts argues that its and Bergen's proposals should be deemed timely delivered.

The Army states that the government did not act improperly by restricting the courier's access to Building No. 2444. In the alternative, the agency argues that even if the Army's action is deemed improper, the protesters' agent, Federal Express, rather than the government, was the paramount cause of the late delivery. Specifically, the Army states that the Federal Express courier's failure to

call the point of contact designated on Bergen's proposal envelope and failure to give the government a reasonable amount of time to accept delivery were the paramount causes of the late delivery. The Army maintains that 10 minutes was not a reasonable amount of time to allow for acceptance of the delivery by the government. Additionally, the Army states that since Bergen's envelope clearly indicated that 12:00 noon was the deadline for receipt of proposals, the courier should have returned to Building No. 2444 before noon and allowed sufficient time for the agency point of contact to get to Building No. 2444's loading dock to accept delivery of the proposals.

A proposal delivered to an agency by Federal Express or other commercial carrier is considered to be hand-carried and, if it arrives late, can only be considered if it is shown that some government impropriety after receipt at the government installation was the paramount cause of the proposal's late arrival at the designated place. Dakota Woodworks, B-233178, Jan. 12, 1989, 89-1 CPD ¶ 33. Improper government action is affirmative action that makes it impossible for an offeror to deliver its proposal on time. Econ, Inc., B-222577, July 28, 1986, 86-2 CPD ¶ 119. A late proposal should not be considered, however, if the offeror or its agent contributed significantly to the late receipt by not acting reasonably in fulfilling its responsibility to deliver a hand-carried proposal to the proper place by the proper time, even though late receipt may have been caused in part by erroneous government action. Monthei Mechanical, Inc., B-216624, Dec. 17, 1984, 84-2 CPD ¶ 675. In this regard, delays in gaining access to a government building are not unusual and should be expected. Econ, Inc., B-222577, supra.

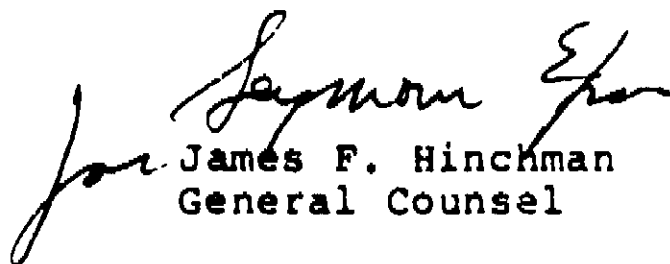
The record establishes that the depository for receipt of proposals in Building No. 2444 was not accessible because a government security guard restricted the Federal Express courier's entry into the building. Thus, the government may have contributed to the late delivery of the proposals. However, we do not think that the government's action here was sufficient to constitute improper government action requiring acceptance of the proposals because while the guard may have restricted the courier's access to the depository, he did not make it impossible for Federal Express, the offerors' agent, to make delivery. In fact, the agency and the Federal Express courier both state that sometime after 8:33 a.m., on September 7, the security guard called the mailroom and requested that someone come to the loading dock to accept delivery of the proposals. The record indicates that delivery was not effected because the courier left after waiting only 10 minutes (15 minutes

according to the courier) for someone to accept delivery of the proposals.

The courier, in his affidavit, states that on numerous occasions prior to September 7, he had been unable to make timely deliveries to Building No. 2444 because no government personnel were available to accept the deliveries. In this case, however, the Federal Express label clearly identified the recipient and provided her phone number so the courier could have made a timely delivery if he had called her directly rather than having the security guard call the mailroom for someone to accept delivery. Moreover, since the courier was familiar with delivery restrictions at Building No. 2444, he should have anticipated a possible delay and waited to make the delivery, particularly since the security guard had called the mailroom to ask someone to come to accept delivery of the proposals. Further, although only one of the proposals was properly marked with the solicitation number, date and time for receipt of proposals, if the courier had read the label and returned prior to 12:00 noon, allowing sufficient time for the agency's acceptance of the delivery, both proposals would have been timely received by the contracting activity.

In these circumstances, where the paramount cause of the late delivery of the two proposals was, initially, the failure of the Federal Express courier to wait for a reasonable amount of time for the government to accept delivery and, subsequently, the failure of the courier to return by the time designated on one of the proposal envelopes to make another attempt at delivery, the government's action in restricting the courier's access to the proposal depository does not constitute improper government action requiring acceptance of the proposals.

The protests are denied.


James F. Hinchman
General Counsel